Supreme Court of the United States

OCTOBER TERM, 1944

No. 798

SAFEWAY STORES, INCORPORATED, *Petitioner,*

v.

CHESTER BOWLES, Price Administrator.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

OPINION BELOW

The opinion (R. 593) of the United States Emergency Court of Appeals was rendered on November 29, 1944, and is not yet reported.

II

JURISDICTION

The judgment of the Emergency Court was entered on November 29, 1944. (R. 605.) The jurisdiction of this Court is invoked under Section 204(d) of the Emergency Price Control Act of 1942, 56 Stat. 31, 50 U. S. C. Appx. § 924(d).

III

STATEMENT OF THE CASE

A full statement of the case has been given under heading "A" of the Petition (pp. 1-6 herein) and it is incorporated here by reference.

IV

SPECIFICATION OF ERRORS

1. The Emergency Court erred in entering a judgment dismissing the complaints.

2. The Emergency Court erred in holding (R. 597) that the Administrator's classification of stores based on the volume of sales and type of ownership was neither arbitrary nor capricious.

3. The Emergency Court erred in failing to hold that the percentage mark-ups were not supported by proper or adequate data and that they were unconstitutionally discriminatory and not generally fair and equitable.

4. The Emergency Court erred in failing to hold that the Administrator had arbitrarily precluded the petitioner from realizing any appreciable mark-up allowance for performing essential wholesale functions.

5. The Emergency Court erred in referring to the profits of the industry in determining the propriety of the Administrator's actions.

6. The Emergency Court erred in holding (R. 597) that Section 2(h) of the Act which prohibits the Administrator from compelling changes in the business practices "in any industry" is not applicable to a situation involving the business practices of but one member of that industry.

7. The Emergency Court erred in failing to hold that Section 2(a) of the Act requires the Administrator to heed the recommendations of industry.

V

QUESTIONS PRESENTED

The primary questions presented are:

(1) Whether the Administrator may classify stores on the basis of sales volume and type of ownership (chain or independent) without regard for the services rendered or the functions performed.

(2) Whether the Administrator, by adopting widely varying price differentials, may discriminate between petitioner's stores in Groups 3 and 4 and also between those stores and independent stores (Groups 1 and 2) which do less than $250,000 gross business annually, as do the majority of petitioner's stores.

(3) Whether the Administrator may provide mark-up allowances for pre-retail functions and services performed by persons other than petitioner without providing similar mark-up allowances for such functions and services when they are performed by petitioner.

VI

STATUTORY PROVISIONS INVOLVED

The only statute involved is the Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U. S. C. Appx. § 901 et seq. The provisions thereof, insofar as pertinent to the questions here presented, follow:

> "Sec. 2. (a) . . . the Price Administrator . . . may by regulation or order establish such maximum price

or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941, . . . Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order, and shall give consideration to their recommendations. . . .'

"(h) The powers granted in this section shall not be used or made to operate to compel changes in the business practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, or changes in established rental practices, except where such action is affirmatively found by the Administrator to be necessary to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act."

"Sec. 204. (a) . . . Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: . . .

"(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. . . ."

VII

SUMMARY OF ARGUMENT

Point 1. The Administrator's classification of stores was based upon academic and statistical studies, none of which was made for the purpose of controlling or determin-

ing prices or any other business practice; it was contrary to the recommendations of representatives of the wholesale and retail food industry; and it interferes with the petitioner's historic, publicly-advertised, and consumer-accepted business practice of maintaining the same prices on the same commodities in all of its stores in the same trading area, irrespective of the total sales volume of each store.

Point 2. The Administrator adopted retail percentage mark-ups for various food commodities in announced pursuance of certain studies which were supposed to reflect the historic price margins of each store group. However, the margins data are shown to be inadequate and not representative for the purpose intended. For example, the initial study covered 58 food commodities in 23 cities, but no city of less than 250,000 population was included, and they were located, for the most part, in the northeastern and midwestern sections of the country and were out of proportion to the population of the cities in which they were taken. Furthermore, the data gathered were used in such an arbitrary manner as not to reflect the original margins, or they were disregarded when the results did not suit the Administrator's policy purposes.

Point 3. The petitioner performs substantially the same functions and services prior to the retail level as are performed by other persons in the handling of food commodities destined for retail stores. Since the argument of this case before the Emergency Court the Administrator has recognized the performance of *pre*-warehouse functions by the petitioner and made a small allowance therefor but he still precludes the petitioner from realizing anything for performing the *warehouse* services and functions from the time of entry to the warehouse through delivery to the retail stores. Compensation should be allowed for the

performance of such essential functions regardless of who performs them.

Point 4. The Emergency Court improperly referred to the "annual net profits before taxes of 12 of the largest retail food chains, among which is the complainant". (R. 603.) Prices, not profits, are to be regulated under the Price Control Act. No premium is placed upon efficiency. The fact that an over-all profit is realized does not mean that discriminatory regulations have not caused actual losses on specific items. Still more important is the fact that an over-all profit does not condone discriminatory regulations in relation either to one or many items. Furthermore, an examination of the industry profit figures contained in the present record shows the adverse effect upon the petitioner of the discrimination practiced against it.

Point 5. The Emergency Court, in violation of the due process clause of the Fifth Amendment, has interpreted the Price Control Act in such a way as to make it unconstitutionally discriminatory and to render the review provisions ineffective. The Administrator has provided allowances for the performance of some pre-retail functions and services in order "to correct a gross inequity," but he continues to refuse allowances for the performance of the remaining pre-retail functions and services for which provision is made in the case of the majority of petitioner's competitors. If the Price Control Act may properly be held to permit any such injuriously discriminatory, in equitable and arbitrary action on the part of the Administrator it must also be held to violate the due process clause of the Fifth Amendment. Furthermore, if the Administrator act arbitrarily, as he did in this case, the court must set aside the regulation. Instead, it disregarded the arbitrary features thereof on the ground that the over-all price structure was not shown to be generally unfair and inequi-

table. In order to make such a showing it would be necessary, according to the lower court, to show that the regulation is unfair and inequitable in its application to a *major* portion of the industry. The obvious impracticability of presenting such a showing makes the court's interpretation a bar to any effective review, and it therefore makes a mockery of the due process provided by the Act and guaranteed by the Fifth Amendment.

VIII

ARGUMENT

Point 1. The Administrator Acted Arbitrarily and Capriciously in Classifying Retail Food Stores by Sales Volume and Type of Ownership.

The Administrator's determination to place retail food stores in various classes for the purpose of fixing prices resulted in dividing stores into four groups based upon 1942 gross sales volume and type of ownership, that is, whether it was independently owned or a member of a group of four or more stores under common ownership doing a total 1942[3] business of $500,000 or more. The services rendered and functions performed by the stores were not taken into consideration. If an independent store had 1942 gross sales of less than $50,000 it was placed in Group 1, but if it had $50,000 or more, but less than $250,000, it was placed in Group 2. If a chain store, on the other hand, had less than $250,000 it was placed in Group 3. If either a chain or an independent had $250,000 or more it was placed in Group 4. Generally speaking, the ceiling

[3] The use of 1942 sales volume for the purpose of determining the classification of a store was changed by Amendment 5 to MPR 390 and Amendment 17 to MPR 422, both issued May 26, 1944, effective May 25th, to provide for a reclassification, based upon 1943 sales volume, beginning June 15, 1944.

prices decrease as the group number increases, although, as shown by the table (R. 525-6) to which reference has already been made, differentials may vary considerably.

Thus, where there are two competing stores, one an independent and the other a part of a chain, each dealing in substantially the same commodities and having had less than $50,000 in 1942 sales, the Administrator places the independent in Group 1 and the chain store in Group 3. Thereafter, as seen by the aforementioned tables, the chain store is limited to a mark-up of approximately 41¢ on the same quantity of sugar that the independent may mark up $1.00. If the chain store should happen to have had a 1942 sales volume of $250,000 or more its mark-up would be cut to 35¢. And the same low mark-up would apply even though it were a large (Group 4) independent and even though it offered services, such as delivery and charge accounts, not obtainable from its competitor.

According to the record (R. 72-3): "In determining what classification should be adopted, the Price Administrator considered several pre-existing classifications in use by governmental agencies and private institutions. Among others, classifications employed by the Bureau of the Census, Dun and Bradstreet, the A. C. Neilson Company, various Schools of Business Administration, and trade journals were considered." However, none of these studies and classifications was made for the purpose of controlling or determining prices or any other business practice. They were for purely academic or statistical purposes, and are used by such persons as market analysts, credit managers, and investment bankers.

The Administrator claimed below that his classification was "based on trade practices established prior to price control," but he has yet to point to any trade practice which supports his theory. As a matter of fact, his assertion is inconsistent with his aforementioned admission that

the classification was adopted after considering "several pre-existing classifications in use by governmental agencies and private institutions."

The most that can be said for the "model" classifications considered is that they were for the particular convenience of the compiler or to suit his immediate whims. As a matter of fact, a Bureau of Census report to which the Administrator refers (R. 74) states that "trade interests have suggested that the annual sales volume line for a supermarket be set variously at $300,000, $250,000, $100,000 and even as low as $50,000." A footnote to that statement shows that $200,000 and $150,000 were also suggested. It would appear, therefore, that one person's guess is as good as another's for the purpose of classifying stores by sales volume. It all depends on how detailed a breakdown is desired. But certainly no figure may reasonably be used as a line of demarcation for fixing price differentials.

Section 2 (a) of the Emergency Price Control Act provides that "Before issuing any regulation or order . . . the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order." Congress would hardly have inserted that provision if it had not intended that the Administrator should pay some attention to the recommendations of industry when he found it "practicable" to "advise and consult" with the representatives thereof.

At a meeting of representatives of the wholesale and retail food industry, including both chains and independents, large and small, held at the Washington Hotel, Washington, D. C., on June 15-16, 1943, upon the invitation of the then Price Administrator, detailed recommendations were adopted. The Administrator was thereby asked to discontinue the classification of stores by sales volume and type of ownership, to establish only one ceiling price, and

to provide allowances for the performance of services and functions regardless of who performs them.[4] (R. 291-3.)

It is, therefore, difficult to understand the statement of the Administrator (R. 62-3) that the establishment of a single maximum mark-up for all retail food stores "would have been unfair to the food distribution industry". The only explanation given by the Administrator is that a single ceiling price would make it impossible for the small service store to continue its operations in competition with the large self-service store, which would be afforded "unprecedented margins". (R. 63, 348.) The lower court agreed. (R. 594-5.) But, significantly, *no such fear was voiced by the representatives of small independent retailers who attended the industry meeting.*

The lower court treated lightly these industry recommendations and adopted the Administrator's contention that if he had followed the industry's single-price recommendation the purpose of the Price Control Act would have

---

[4] The following excerpts are especially pertinent (R. 292):

"(c) Cost of doing business not related to ownership. It is only partly related to volume per store. It is directly related to functions performed and services rendered.

"(d) Recognize functions performed and services rendered. Allow fair margin for performance of function based on actual cost. Grant margin to all who perform function regardless of ownership.

". . . . . .

"(a) Establish and publish one ceiling price beyond which no one may sell. Historical margins and competition among distributors will control prices at other levels.

". . . . . .

"4. Discontinue classification of stores by volume or ownership. (If classifications are necessary, they should be on the basis of type or operation of establishments, functions performed and services rendered.)"

At a meeting held August 13, 1943, in the Office of Price Administration by representatives of the meat retailers a similar recommendation was unanimously adopted, namely, that *only one price ceiling should be established for meats at the retail level.* (R. 290.)

been thwarted and the way opened for an inflationary increase in the cost of food products in the low-cost food stores. In presumed support of this contention the court quoted from a statement made at a congressional hearing by counsel for the Food Industry War Committee (R. 595.) However, the court does not include a sufficient excerpt from the hearings to show that the position taken by the counsel for the committee was in reality *his own*, rather than that of representative members of the retail and wholesale food industry, as in the case of the aforementioned recommendations.[5]

The Administrator also makes the bald assertion that in times of scarcity a single price ceiling works to the consumer's disadvantage because prices of the scarce commodities "become speculative and abnormal unless held

---

[5] The court quoted from the hearings on H. R. 4376, 78th Congress, 2d Session, Volume 1, Page 408, which quotation, with the preceding sentence added, is:

> "Mr. Smith [counsel for the Food Industry War Committee]:
>
> . . . For example, here the extreme recommendation is to do away with the classification and require only one price for a given retail level. We do not think that is a sound recommendation, because the administrator may be driven to an average price that will be too low for the highest price fellow and too high for the lowest, or be driven to too high a ceiling, if you were fair to the little fellow, so we do not recommend the extreme position."

During the questioning which followed immediately by Mr. Crawford (member of the House Banking and Currency Committee from Michigan) the following occurred:

> "Mr. Crawford: . . . I see some names here of people who have been approaching me, and I thought they had some rather strong convictions on this, but I am not so sure they have, so I want to be able to answer them when I see them the next time.
>
> "Mr. Smith: *You will have to put the blame on me* because *I have sought to get the whole thing down to the middle ground*, and I think I have, and *I will take the blame*." (Emphases supplied.)

in check by maximum price regulations." (R. 348.) Such statements are not only contrary to the practical recommendations of representative members of the industry, including both large and small independent and chain retailers, but they are not borne out by common-sense facts. If a commodity be scarce, there is no reason to believe that a low-cost retail distributor will receive more than its share or that it will sell at the ceiling price. The wholesaler will generally allocate scarce items in order to preserve good will, and the low-cost retailer will keep its prices on a competitive basis for the same reason. When items are allocated all outlets receive their respective shares, and competition will continue among the low-cost retailers as well as between them and the higher-cost outlets.

As shown in another case filed herein by this petitioner (Docket No. 799), its own actual experience in the case of meat, which has been scarce for some time but to a varying degree, a store which is compelled to sell at a lower price will not have its proportionate supply of the scarce items, and the public will, therefore, be forced to purchase at the higher-cost outlets. That record shows that petitioner received only 70% of the meat supply permitted by Government quota allowances. (Docket No. 799, R. 6, 17-18. See also Petition and Brief therein, p. 15.)

Furthermore, even in the case of scarce items, if a store which normally sells at reduced prices should take advantage of a period of scarcity and increase the price of the scarce items it would have an immediate ill effect upon the good will of customers and would tend to divert them to stores which normally sell at maximum prices. Therefore, the few normally low-cost stores which might take advantage of a period of scarcity to charge the maximum prices could not reasonably be said to constitute an inflationary threat.

Section 2(h) of the original Price Control Act prohibited the Administrator from using his powers "to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation". And by the Act of June 30, 1944, 58 Stat. 632, this prohiibtion was clarified by inserting the requirement that such changes may only be compelled where they are "affirmatively found by the Administrator to be necessary" to prevent such circumvention or evasion.

As heretofore stated, petitioner has an historic, publicly-advertised and consumer-accepted policy of maintaining the same prices on the same commodities in all of its stores in the same trading area, irrespective of the total sales volume of each store. This single-price business practice is one of the corner stones of petitioner's retail trade success, and in order to maintain it and the good will which it has developed, petitioner must not vary the prices charged by its stores in the same trading area regardless of their gross volume.

The lower court suggests (R. 597) that this policy may be continued by the simple expedient of lowering all of petitioner's Group 3 store prices to those of the minority (Group 4) of its stores. But this does not take into consideration the unreasonable and arbitrary burden of such procedure. By forcing petitioner to follow it the court says, in effect, "Either reduce all of the prices in your Group 3 stores to those fixed as maximum for your Group 4 stores, and take a loss if need be, or disregard your consumer-accepted and publicly-advertised business practice." Certainly that is not the type of attitude that Congress intended to exempt from the prohibition of Section 2(h) of the Act.

The Administrator's classifications, in the absence of any pertinent data such as actual trade practices, and in the

light of contrary practical recommendations of representative members of the industry affected, must be held to be arbitrary and capricious.

Point 2. The Differentials Adopted by the Administrator were Based upon Data which were neither Adequate nor Representative, and also upon an Arbitrary Use of that Data.

The object of MPR 422 (re Groups 3 and 4 stores) and MPR 423 (re Groups 1 and 2 stores) was to establish maximum mark-ups for each of the retailer groups based upon the group margins historically prevailing. To that end the Bureau of Labor Statistics (hereinafter often called BLS) of the United States Department of Labor was requested to make a study for the Administrator for the purpose of collecting the historical data. The study was to be conducted in accordance with broad and detailed "Instructions on Field Procedures for Food Margins Study" (R. 301-337) issued by BLS to its field representatives. There were 56 cities listed in which the study was to be made, together with the minimum number of "reporters" of each type to be included in each city. (R. 262.) A total of 600 reporters was originally contemplated for Group 4 stores.[6] (R. 279-280, 308.)

There is included in this record (R. 260-286) a Report prepared and verified by the accounting firm of Peat, Marwick, Mitchell & Company concerning the Administrator's methods of setting maximum mark-ups for food commodities as ultimately incorporated in MPR 422 and MPR 423. The first collection of retail data was made by the Bureau of Labor Statistics in 23 cities on August 18, 1942, but other studies were later made, some covering the

[6] Group 4 stores were not so designated in the "Instructions", but those covered by the Report were the chain and independent stores having over $250,000 annual sales volume. They were designated in the instructions as "Supermarkets". (R. 303-4, 308.)

same items and covering additional items. The Peat Report is confined to the original study, to two later studies, and to Group 4 stores.

The Report shows that the percentage mark-up differentials *used* by the respondent were actually obtained in only 23 cities instead of 56; that 600 reporters were originally sought for 56 cities but that this was reduced to 270 for 23 cities; that no city of less than 250,000 population was included among the 23; that 46 reporters were orginally sought in Los Angeles and 14 in Detroit, while 10 were considered sufficient in all other cities, including New York and Chicago;[7] and that, instead of the minimum number of reporters desired for each commodity, only a fraction was obtained for several of the important items. (R. 265, 279-281, 283.)

The Report further shows that reporters could not have been truly representative because they were obtained in greatest number from certain sections of the country and, as admitted by the Administrator (R. 404), "The number of stores from which data were obtained in each city was not proportional to the relative importance of each city."[8]

---

[7] The Administrator states (R. 403) that "supplementary instructions" were issued to the field representatives changing the number of outlets to be contacted—a fact of which petitioner's accounting representatives were not advised at the time they prepared the Report. Accordingly, a minimum of only 10 stores for each city was established, or a total of 230 outlets in 23 cities comprising the first study. It would seem that this minimum, as compared with the original 270, while more representative, certainly was not adequate and the goal set did not alter the actual reporters obtained as shown on Exhibits I and II (R. 279-281).

[8] New York with 30% of the aggregate population furnished 8.4% of the reporters while Los Angeles with 6% furnished 7.6%, and Detroit with 6.5% furnished 9.2%; and because the cities were mostly those where the stores were within a short distance of the warehouses supplying them and would therefore have lower prices. (R. 264, 266, 267, 281.)

The fact that distance from the warehouse has a bearing upon store prices is shown by Section 22 of MPR 422 which provides 1% to 4% additions to mark-ups depending upon such distance. (R. 267-8.)

It also appears that the Administrator made an arbitrary use of the BLS data to suit his own purposes, even to the extent of having the permissible margins, which had been arbitrarily determined, reviewed by a policy committee which frequently made additional changes to suit the whims of the Administrator.[9]

The lower court claimed to have examined the criticisms of the BLS studies and of the Administrator's use thereof, and it concluded that those criticisms were without merit. (R. 598.) Furthermore, the court took the position that the Administrator, rather than being obligated to use the results of the BLS studies, was compelled to fix such maxi-

---

[9] From the BLS data the Administrator prepared so-called frequency tables for each product studied on August 18, 1942, and then placed those tables in combinations from which frequency charts or curves were drawn. (R. 268-9, 282, 285-6.) The Administrator then used a so-called "standard" curve or a "normal" curve to superimpose on the frequency curves, which latter were generally very irregular due to the wide range of margins represented. (R. 270.) The "standard" curve (Chart 3, R. 284) was prepared from a sampling of margins obtained on sugar by Class 1 (service and delivery) *wholesalers*. The "normal" curve (Chart 4, R. 284) was prepared from a sampling of margins obtained on canned vegetables by Class 1 *wholesalers*. (R. 270.)

The Administrator then used his trick curves, "standard" and "normal" which he had developed from a study of *wholesale* margins, and superimposed them upon frequency curves, which he had developed from a study of *retail* margins, in order to determine permissible retail mark-ups. He did this by examining the frequency chart or curve for each commodity and superimposing upon it the "standard" or "normal" curve, depending on which seemed to him more closely to apply. Even though there could be no question as to which one did apply there still remained the problem exactly where to superimpose it so that, when methodically expanded at the base, the superimposed curve would represent a theoretical normalized version of the actual curve. (R. 271.) It was this normalizing process that could hardly help but be arbitrary. In fact, it would have been entirely accidental if two persons had obtained the same result.

The record contains a reproduction of the superimposition by the Administrator of his "normal" curve upon an actual curve. (Chart 5, R. 285.) Beside it are two more reproductions of the same actual

mum prices as "in his judgment were generally fair and equitable and were such as would effectuate the purposes of the Act." (R. 599-600.) This assertion of the lower court overlooks the fact that the Administrator stated (R. 389-390):

> "In constructing original Maximum Price Regulation No. 238, issued October 10, 1942, the Price Administrator's staff used as a guide the food margins collected by the Bureau of Labor Statistics during August, 1942. In constructing Revised Maximum Price Regulation 238 and Maximum Price Regulations Nos. 422 and 423, the Price Administrator's staff used as a guide subsequent collections as were deemed necessary to establish maximum mark-ups on additional commodities and *to review maximum mark-ups already established.*" (Emphasis supplied.)

Admittedly the Administrator was not bound to use the BLS studies, but he was bound to determine prices which "in his judgment" were generally fair and equitable and were such as would effectuate the purposes of the Act. However, his was not to be an *unbridled* judgment. In fact, Section 2(a) of the Act admonished him, as far as practicable, to regard the prices in effect between October 1st and 15th, 1941. Even then he could not exercise his judgment in an arbitrary and capricious manner. Indeed, the Emergency Court, by Section 204(b) of the Act, is given

---

curve but with the "normal" curve superimposed at different points. They appear to be substantially the same, and certainly there could be no definite choice from the standpoint of proper normalizing, yet, translated into permissible margins, the Administrator's effort results in a mark-up of 23%, whereas the adjoining illustrations (Charts 6 and 7) result in mark-ups of 28% and 31% respectively. (R. 271-2, 285.)

After the permissible margins were thus arbitrarily determined they were reviewed by a sort of "policy committee". In the case of sugar the committee apparently disapproved because a margin of 5.5% (mark-up of 6%) was finally allowed whereas the superimposing process showed (Chart 8, R. 286) that it should be approximately 8.5% or 9.0%. (R. 273.)

specific authority to invalidate any regulation based upon an arbitrary or capricious exercise of that judgment.

The fact that the Administrator claims to have used the BLS studies as a guide in determining mark-up allowances obviously makes those studies pertinent to a determination of the propriety of the mark-ups. This, in turn, necessarily involves consideration of the manner in which they were used. Inasmuch as the BLS studies were found to be neither adequate nor representative for the purpose of determining historic margins, and as those figures are shown to have been arbitrarily used by the Administrator, or disregarded entirely when the results did not suit his purposes, it must be concluded that he acted arbitrarily and capriciously in adopting the percentage differentials in question.

Point 3. The Administrator has Arbitrarily and Capriciously Precluded the Petitioner from Realizing any Appreciable Mark-up Allowance for Performing Essential Pre-retail Functions.

Petitioner has already mentioned (supra, pp. 2-3) the various pre-retail functions performed and services rendered. Suffice it here to recall that petitioner not only performs the functions of a secondary or service wholesaler that receives, inspects, cares for and stores supplies in a warehouse, assembles retail orders, loads the trucks and makes deliveries, but it also performs pre-warehouse functions similar to those of a commission merchant, broker, and carlot distributor. In the case of canned goods, and most of the other dry groceries listed in Table A (R. 525) only warehouse functions are involved insofar as the present issues are concerned, whereas the majority of the perishables mentioned in Table B (R. 526) also entail pre-warehouse services.

Except for certain functions and services performed in

the handling of a few commodities, no allowances were provided for petitioner to cover any pre-retail function or service until after the argument in the lower court. Then, more than 15 months after the issuance of the protested regulations, the Administrator recognized the error of his ways and relented to some degree. This he did through Amendment 32 to MPR 422 (9 F. R. 12590) whereby he provided petitioner, and others in the same category, a meager mark-up of 1½% above first cost, after the adjustment of certain specified charges and additions, for the performance of certain *pre-warehouse* functions.. The Economic Stabilization Director approved the action as being *"necessary to correct a gross inequity."* However, this partial relief applies only to fresh fruits and vegetables in "carlot" or "trucklot" quantities.

In other words, the Administrator, by his arbitrary disregard of petitioner's performance of certain essential functions and his failure to provide any allowance therefor, has actually penalized the petitioner—a fact which he has now, more than 15 months later, admitted. Obviously, if petitioner be entitled to relief now "to correct a gross inequity", it was entitled to it in the first place.

While now providing allowances for the performance of pre-warehouse functions when performed by petitionr and others similarly situated, the Administrator has, in Amendment 31 to MPR 422 (9 F. R. 12589), omitted any allowance for pre-warehouse functions in the case of commodities (not processed or manufactured by petitioner) *other than fresh fruits and vegetables*, even though such functions be performed by subsidiary companies.

Inasmuch as the question of the actual amount which should be allowed is not here involved it may be considered that, for practical purposes, the issue of mark-up allowances insofar as they apply to *pre-warehouse* functions

and services covering fresh fruits and vegetables has now been partially eliminated insofar as *this particular proceeding is concerned.*[10]

There still remains the question of an adequate and equitable allowance not only for the *remaining pre-retail* functions and services, namely, those performed *after* the commodities are received in petitioner's warehouses and until they are actually delivered to petitioner's retail outlets, but also for those *pre-warehouse* functions performed for commodities (not processed or manufactured by petitioner) other than fresh fruits and vegetables.

The warehouse functions performed are similar to those of a secondary or service wholesaler who receives, inspects, cares for and stores supplies in a warehouse, assembles retail orders, loads the trucks, and makes deliveries. Warehouse functions must be considered just as important as the functions performed by the petitioner *before* the commodities reach the warehouse.

Therefore, the petitioner must still compete, without receiving any adequate allowance therefor, with the retailer-owned cooperative wholesaler for whom an allowance is provided (MPR 421, §32) for the performance of warehouse or wholesale functions, such allowance being in addition to any allegedly included in the retail mark-up allowed petitioner under MPR 422. This may be observed from the fact that retail outlets belonging to or associated with retailer-owned cooperative wholesalers are permitted, under MPR 422, to apply mark-ups identical with those provided for petitioner's retail stores.

The lower court adopted the Administrator's contention that the retail mark-ups permitted petitioner accurately reflect the functions performed by it between the entry of

---

[10] Petitioner does not admit that the allowance provided by Amendment 32 is adequate, or that the provisions of Amendments 31 and 32 are otherwise wholly proper.

the fresh fruits and vegetables into the warehouse and the sale at retail. (R. 602.) The court held that the "burden was on the complainant to show that the margins upon which the mark-ups under attack were constructed did not historically reflect the specific function or service in question. This it has wholly failed to do." (R. 602.) However, the court overlooked the fact that the agents who collected the margin data which the Administrator claims to have used as a basis for the percentage mark-ups in question were instructed, "with respect to corporate chain store organizations", to *exclude* "expenses incurred by the purchaser in warehousing the merchandise or in delivering it from the warehouse to the individual stores". (R. 157.)

Further evidence of the validity of petitioner's position is that the same mark-ups are provided in every case for Group 4 stores whether they be independent or chain, and regardless of whether they obtain their merchandise from their own warehouses, from independent wholesalers, or from retailer-owned cooperative wholesalers. If the Administrator's contention, as accepted by the lower court, be true, it means that a Group 4 store which purchases from a wholesaler receives an allowance for functions already included in the separate wholesale mark-up;[11] otherwise the Administrator must abandon his own thesis.

[11] For example, in the case of gelatin and pudding mixtures (Item #14 in Table A, R. 525), if a Group 4 retailer should purchase from an independent "service and delivery" wholesaler he will pay $2.21 per carton, of which 21¢ represent the wholesale mark-up under MPR 421. Then he will be permitted, under MPR 422, to add a retail mark-up of 13% (29¢), which mark-up, according to the Administrator, is supposed to include enough to compensate for the performance of the wholesale *and* retail functions, although the wholesale function has already been performed by the independent wholesaler and 21¢ (10.5%) have already been added to compensate him therefor. But when the petitioner makes delivery from its warehouse to its store it may only add 13% (26¢, because the cost base is $2 instead of $2.21), which must compensate it for both the wholesale and retail functions. Of course, that doesn't make sense; but maybe it isn't supposed to.

It is submitted that the retail mark-ups under MPR 422 and MPR 423 and the arbitrary method by which they were determined as disclosed under Point 2, supra, do not warrant the acceptance of the chain store mark-ups as compensatory for all functions subsequent to delivery at the warehouse, or for any other purpose; that in no event do the mark-ups now allowed chain stores compensate for the performance of all pre-retail functions; that an allowance for the remaining pre-retail functions is just as "necessary to correct a gross inequity" as was the allowance for those functions already recognized; and that the failure and refusal of the Administrator to accord the same fair and equitable treatment to all persons performing pre-retail functions are arbitrary, capricious, and contrary to law.[12]

Point 4. Over-all Profits are Irrelevant to this Proceeding, but They Show the Effect of the Administrator's Discriminatory Action.

Petitioner insists that *prices, not profits*, are to be regulated under the Emergency Price Control Act, and that neither the Administrator's so-called (by him, R. 372) "practical considerations", or any other considerations, warrant reference to over-all profits. However, the lower court has relied upon profits as a supporting factor, calling attention to them to show that in the over-all picture the petitioner has not been injured, and suggesting this as a reason for petitioner's failure to produce actual figures to show a loss on particular items. (R. 604.)

In the first place, profits alone are meaningless to show a fair return without a statement of the capital investment

[12] The Trade Commission of the State of Utah has complained to the Administrator concerning his failure and refusal to permit allowance for *all* wholesale functions performed by food store organizations that purchase direct from manufacturers and sell only through retail outlets. (R. 584-8.)

upon which they depend. Any such statement, which should be fundamental in any fair presentation of this character, is totally lacking here. In the second place, even the figures presented by the Administrator refute his own argument.

Under the General Maximum Price Regulation, 7 F. R. 3153, issued April 28, 1942, as stated by the Administrator, "maximum prices for nearly two-thirds of all food products were established at the highest price charged by individual retailers for such commodities during the month of March, 1942." Under this regulation petitioner continued to realize its historical mark-ups for performing all pre-retail functions. Then came MPR 238 on October 10, 1943, and MPR 268 on November 7, 1943, fixing percentage mark-ups on dry groceries and perishables, respectively. On these items petitioner was thereafter prevented from realizing any allowance for pre-retail functions. MPR 422, issued July 8, 1943, expanded the number of items and adjusted certain mark-ups which had been previously set under MPR 238 and MPR 268.

Therefore, during the greater part of 1942 petitioner realized its historic mark-ups for performing pre-retail functions. During the latter part of that year, and during the entire year 1943, petitioner and every other direct-buying chain store organization doing business as a single corporate entity were denied credit for performing pre-retail functions. As heretofore stated, this condition continued until October 15, 1944, when a small allowance was made for the performance of pre-warehouse services.

The lower court compares the 1943 "net profits before taxes of 12 of the largest retail food store chains" with their earnings in preceding years. (R. 603.) But in doing so it discloses that the earnings were more than $1,700,000 less in 1943, when no allowance was made for pre-retail functions, than in 1942 when, for the most part, compensation was taken for pre-retail functions. This amounts to a reduction of more than 4.57%.

The Administrator contended below that, for a "larger group of 56 chains, the record shows that 1943 was a better year than even 1942," and that the "percentage ratio of net profits before taxes to net sales was 1.9% for the first six months of 1943 compared to 1.7% in 1942." (See R. 375, 420.) The names of the 56 chains are not given, and so it is not known whether they include the 12 whose earnings for different years are compared. However that may be, it is obvious that most of the 56 chains are of the smaller variety which do not buy direct and maintain shipping point offices and receiving and storage warehouses. In other words, they include, for the most part, chain organizations which do not incur pre-retail expenses and whose mark-ups accordingly might be considered adequate because only retail expenses need be paid therefrom.

It is therefore illuminating, but not surprising, to note that a group of chains comprising many that are not concerned with compensation for pre-retail functions show an *increase of 0.2%* (percentage ratio of net profits before taxes to net sales) for the first six months of 1943 over the same period in 1942. Similarly, it is illuminating, but not surprising, to note that a group of the largest food chains, which buy direct and are therefore deeply concerned with allowances for pre-retail functions, show a *decrease of more than 4.57%* in their earnings in 1943 from those in 1942 when such allowances were realized.

There is only one conclusion that can be drawn from this comparison: The failure of the Administrator to permit chain store organizations, such as petitioner, to realize their historic return for performing pre-retail functions has made substantial inroads upon their earnings in spite of increased sales. The discrimination fathered by the Administrator is thus further emphasized.

Point 5. The Interpretation of the Emergency Court makes the Price Control Act Unconstitutionally Discriminatory and Renders the Review Provisions Ineffective in Violation of the Due Process Clause of the Fifth Amendment.

We have seen how the Administrator has discriminated against the petitioner both as to retail percentage markups and as to allowances for the performance of pre-retail functions. Such discrimination was finally recognized (after 15 months!) and *partially* rectified by means of an amendment which was approved by the Economic Stabilization Director as being "necessary to correct a gross inequity". If the failure of the Administrator to grant allowances for the performance of some functions were grossly inequitable, certainly his failure to grant allowances for the performance of other functions must be likewise characterized. And if his failure be admittedly grossly inequitable it must also be considered arbitrary. Obviously, also, it is injurious because it withholds from petitioner compensation for the performance of essential functions and services in connection with which expenses are incurred.

If the Price Control Act should be held to sanction any such injuriously discriminatory, inequitable, and arbitrary action or inaction on the part of the Administrator it would violate the due process clause of the Fifth Amendment. *Currin v. Wallace*, 306 U. S. 1, 14, 83 L. ed. 441, 450; *Detroit Bank v. United States*, 317 U. S. 329, 337, 87 L. ed. 304, 311. An interpretation of the Act to that effect is, of course, equally offensive.

The question of due process under the Price Control Act was presented in *Yakus v. United States*, 321 U. S. 414, 88 L. ed. 653. This Court examined the provisions of the statute and came to the conclusion that "the authorized

procedure is *not incapable* of according the protection to petitioners' rights required by due process."[13] A part of the "authorized procedure" is contained in Section 204 providing for the review by the Emergency Court of actions of the Administrator denying protests against price regulations. Under subsection (b) a regulation shall be set aside if it be "not in accordance with law, or is arbitrary or capricious." Therefore, if the Administrator act arbitrarily, as he did in this case, the court must set aside the regulation, or the part thereof, in question. However, here the court found that the over-all price structure was not shown to be "generally fair and equitable" and so *disregarded the arbitrary features* thereof. This is in accordance with its opinion expressed in *Philadelphia Coke Company v. Bowles,* 139 F. (2d) 349, 355, that a regulation is valid unless it is unfair and inequitable in its application to a "*major* portion of the industry". In other words, it is insufficient if petitioner disclose arbitrary features of a regulation even though they be injuriously discriminatory to a substantial segment, but not a major numerical part, of the industry. The obvious impracticablity of having the majority of the members of any industry join in presenting such a showing makes the court's interpretation a bar to any effective review, and it makes a mockery of the due process provided by the Act and guaranteed by the Fifth Amendment.

---

[13] This Court stated (321 U. S. 434, 88 L. ed. 665):

> "For the purposes of this case, in passing upon the sufficiency of the procedure upon protest to the Administrator and complaint to the Emergency Court, it is irrelevant to suggest that the Administrator or the Court has in the past or may in the future deny due process. *Action taken by them is reviewable in this Court and if contrary to due process will be corrected here.* . . . But upon a full examination of the provisions of the statute it is evident that the authorized procedure *is not incapable* of according the protection to petitioners' rights required by due process." (Emphases supplied.)

IX

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers in order that both the substantive and procedural provisions of the Emergency Price Control Act, as amended, may be given the effect intended by Congress and required by the Constitution; and that to such end a writ of certiorari should be granted, and that this Court should review the judgment of the United States Emergency Court of Appeals and finally reverse it.

Respectfully submitted,

ELISHA HANSON,
ELIOT C. LOVETT,
Counsel for Petitioner,
729 Fifteenth Street, N. W.,
Washington 5, D. C.

December 29, 1944.